



Office of City Auditor Memorandum

DATE: March 21, 2003

TO: Peter Steinbrueck, City Council President

FROM: Susan Cohen, City Auditor *Susan Cohen*

RE: **Results of Office of Hearing Examiner Review**

The City Council will be appointing a new Hearing Examiner after the term of the current Hearing Examiner expires in April 2003. Consequently, the City Auditor conducted a review of the City's Office of Hearing Examiner with specific attention to developing recommendations regarding:

- Workload management, and opportunities to align the office's organizational structure and staffing level with the workload;
- Whether a process exists for holding the Hearing Examiner accountable for performance both as Hearing Examiner and as department head; and
- Whether the office's current management structure helps ensure that the Office of Hearing Examiner's mission is accomplished.

We interviewed all staff currently working in the office, spent time in the office observing their operations and examining their records, interviewed selected City staff who regularly interact with the Office of Hearing Examiner, and contacted four other jurisdictions in the region to compare practices. We used the *Internal Control—Integrated Framework* of the Committee of Sponsoring Organizations of the Treadway Commission (COSO) to evaluate the Office of Hearing Examiner's management structure and internal controls.

RECOMMENDATIONS

The appropriate management structures, such as workplace expectations, policies and procedures, job descriptions, and work schedules generally appear to be in place at the Office of Hearing Examiner and operating effectively. Some areas of concern are described in the remainder of this memorandum.

1. Workload and the Size of the Organization

Recommendation 1. We believe the current workload could be handled competently with fewer employees than are currently budgeted. The office is functioning reasonably well with two full time equivalent (FTE) Hearing Examiners, a .9 FTE Paralegal, a .6 FTE Administrative Specialist II, and .8 FTE Administrative Staff Analyst. A full-time Paralegal position is being filled with the .6 Administrative Specialist II, with no apparent harm to the outcome of the unit's work. It is possible the staff could be cut even further without harm to the office's mission, but this decision should be left to the incoming Hearing Examiner.

Explanation. The quantity of the work has diminished, especially in the last two years, from a ten-year average of 115 cases from 1983—1992, 99 cases from 1993—2002, and 75 cases in the last two

years¹. Both Hearing Examiners report that the complexity of cases has also diminished. The office abrogated one FTE Deputy Hearing Examiner for the 2003—2004 budget, leaving two FTE Hearing Examiners. One FTE Paralegal has been on medical leave since October 2002, and has been replaced by a temporary .6 FTE Administrative Specialist II (a lower level classification). Exhibit 1 below shows the budgeted and current staffing.

Exhibit 1

Position	Budgeted FTE	Current Actual FTE
Hearing Examiner	1.0	1.0
Deputy Hearing	1.0	1.0
Administrative Staff Analyst	.8	.8
Paralegal	1.0	On leave
Paralegal	.9	.9
Administrative Specialist II	None	.6
Total FTE	4.7	4.3

Recommendation 2. To solve the above-mentioned staffing issues, we recommend co-locating the Office of Hearing Examiner with another agency that performs similar functions such as the Municipal Court, Civil Service Commission, Public Safety Civil Service Commission, Ethics and Elections Commission, the City Auditor's Office or the King County Hearing Examiner.

Explanation. There is some risk in cutting the number of Office of Hearing Examiner staff, which can be resolved by co-locating the office. The Paralegals and the Deputy Hearing Examiner have many years of experience working with Seattle's codes and Hearing Examiner procedures. Since development activity within the City could increase, and subsequently the Hearing Examiner's workload, the Office of Hearing Examiner could be left with insufficient experienced staff to respond to the increase.

The office experiences difficulty with staff availability between the hours of 8 a.m. to 5 p.m. responding to customers at the front counter and answering phones. The Hearing Examiners should not perform these tasks because of the likelihood of contact with a party to one of their cases. With such a small number of support staff, and with all of them on part time and/or flexible schedules, it is difficult to maintain constant staffing of the front counter and phones

If the Office of Hearing Examiner co-located with another agency, this would allow sharing of duties as workloads varied among the agencies, especially for tasks they would have in common such as accepting and properly handling the filing of legal documents at a public service counter. These agencies share a common responsibility to rule on decisions or actions of other units of City (or County) government. All of these government units also (with the exception of the Office of City Auditor) conduct administrative hearings. Hearing rooms could potentially be used more efficiently if shared among several agencies.

¹ These figures include averages only of the more complex cases, and exclude what the current Hearing Examiner describes as "high volume cases" that are not complex and do not take much time.

2. Oversight and Accountability

Recommendation. As the oversight body for the Office of Hearing Examiner, the City Council should adopt policy changes, and possibly make changes to the Seattle Municipal Code (SMC) section governing the Office of Hearing Examiner. These changes would define the oversight and accountability process for the Hearing Examiner, including making provisions for complaints to be lodged and resolved, and perhaps for performance reviews (either annually or preceding re-appointment).

Explanation. SMC 3.02 contains the provisions for the establishment of the Office of Hearing Examiner, the appointment of the Hearing Examiner, and the operation of the hearing function. The City Council has the duty of appointing the Hearing Examiner, first to a one-year term, and thereafter to a four-year term or terms. The Examiner is subject to removal for cause by the City Council. However, beyond the initial appointment process specified in SMC 3.02, the SMC is silent on the process for ongoing evaluation of the Hearing Examiner. The SMC authorizes the Hearing Examiner to appoint subordinate staff, but is silent on accountability for the Hearing Examiner's duties as the department head.

The SMC varies in the details it provides regarding the duties of agency heads for managing their units. For comparison, SMC 2.04.060 covering the duties of the Executive Director of the Ethics and Elections Commission states:

The Executive Director of the Seattle Ethics and Elections Commission shall be responsible for the management of said office, may in the exercise of such duties consult with the Seattle Ethics and Elections Commission...[SMC 2.04.060]

SMC 3.14.420D delineates the duties assigned to the Director of the Office of Intergovernmental Relations:

To appoint, remove, supervise, and control all officers and employees of the Office of Intergovernmental Relations in accordance with civil service laws and rules . . .

The duties for the Director of the Department of Design, Construction and Land Use stated in SMC 3.06.030, Powers and Duties, are:

...under direction of the Mayor, ... manage the Department of Design, Construction and Land Use, appoint, assign and dismiss all employees in conformance with the City's personnel ordinances and rules, . . .

The State of Washington has an Office of Administrative Hearings that hears appeals of unemployment benefits, public assistance, child support, contractors' registration, Department of Social and Health Services licensing, special education and liquor licensing. The Revised Code of Washington (RCW 34.12.010) establishes the office and the duties of the Chief Administrative Law Judge with language very similar to Seattle's ordinance establishing the Office of Hearing Examiner. The Washington Administrative Code (WAC) specifies procedures for filing a complaint about an administrative law judge (though not about the Chief Administrative Law Judge). This language might serve as a model to Seattle for crafting a procedure for filing and handling of a complaint against an appointed head of an independent office. The following is from WAC 10-16-010:

(1) Administrative law judges must at all times adhere to the fundamental principles of law, fairly and equitably. Administrative law judges should be fair in their rulings and should conduct the proceedings in a judicious manner.

(2) Any interested party to an administrative proceeding may file a complaint alleging improper conduct of an administrative law judge. For purposes of this section, an interested party is a person who has a right to receive notice of the administrative hearing.

(3) A complaint concerning a decision or order shall be handled through the appeal or petition for review process. This includes initial or final orders and interim orders or discretionary rulings from which further appeal may be taken.

(4) A complaint concerning the conduct of an administrative law judge, apart from a decision from which further appeal may be filed, shall be in writing and sent to the supervising administrative law judge.

Finally, SMC 4.04.180, Performance Evaluation, requires written evaluations of every City employee by his/her supervisor, conducted at least annually, based on job-related performance. While department heads are City employees, it is not always clear who supervises them except at the time of re-appointment.

The City Council could improve the accountability of the Office of Hearing Examiner, (and also of other small appointed offices) in several ways:

- Define procedures in the SMC regarding how complaints about the Hearing Examiner are to be processed, and assign responsibility for responding to them. There is a process in place for bringing complaints of unethical behavior (the Ethics and Elections Commission), and complaints of discrimination or harassment (the City's Office for Civil Rights). However, if complaints do not fit these categories, it is difficult for a complainant to know where to turn. If the complaint doesn't rise to the level of cause for termination, one option would be to collect complaints until the next re-appointment process and ask for a response from the Hearing Examiner at that time.
- Describe the expectations for the Hearing Examiner, and how their performance will be evaluated. Clarify how they will be held accountable for their different functions—as department head and Hearing Examiner. Perhaps another, neutral person or agency could administer an interim review of the Hearing Examiner. However, care must be taken to establish a system that does not compromise or threaten the independence of the office nor subject it to political influence.
- Establish a time period for a performance evaluation. It could be done as part of the re-appointment process if there is concern that annual reviews might compromise the independence of the Hearing Examiner. If every four years is considered inadequate timing for performance reviews, terms of office could be made shorter.

3. Classification of Job Duties

Recommendation. The Personnel Director should be asked to review the job duties of the Paralegals in the Office of Hearing Examiner, and to compare them to the Paralegals in the Law Department, and to Municipal Court's Court Clerks and Administrative Specialists II. Accordingly, the new Hearing Examiner may want to assign duties to the Paralegals similar to those assigned to Paralegals in the Law Department, including more in-depth legal research and drafting of more complex documents.

Explanation. Several persons interviewed for this review suggested that the Paralegals in the Office of Hearing Examiner are not performing duties commensurate with the classification, and are performing duties more similar to the Municipal Court's Court Clerks. We reviewed the job duties with the one Paralegal currently at work in the Office of Hearing Examiner, and reviewed job

descriptions, position description questionnaires, and job classifications for four positions—Office of Hearing Examiner Paralegal, Law Department Paralegal, Municipal Court Clerk, and Municipal Court Administrative Specialist II. We believe that the duties performed by the Office of Hearing Examiner Paralegal are more similar to those performed by the Municipal Court Clerks. However, because we are not qualified experts in classification, we suggest that the new Hearing Examiner have the positions reviewed by the Personnel Director.

4. Process for Selecting Candidates For The Position Of Hearing Examiner

Recommendation. Modify the process for appointing the Hearing Examiner. At a minimum, create a new citizen representative position on the three-person panel recommending candidates to the City Council, because the Seattle/King County Office of Citizen Complaints position now mentioned in SMC 3.02.110B no longer exists.

Explanation. According to SMC 3.02.110B, when considering candidates for initial appointment to the position of Hearing Examiner, the City Council must appoint a three-member committee composed of the City's Personnel Director, the Director of the Seattle/King County Office of Citizen Complaints, and a representative of the Seattle/King County Bar Association. This committee reviews applications and recommends to the City Council three candidates for the position. The Seattle/King County Office of Citizen Complaints was eliminated in the 1980s. The replacement position on the committee needs to represent the community at large. The head of the City's Citizen's Service Bureau might be a possible candidate, or might suggest one. If a particular position or department is named in the legislation, we suggest adding the words "or its successor department."

5. Temporarily Filling A Vacant Position

Recommendation. Modify SMC 3.92.010 to place control of the appointment of a temporary Hearing Examiner with the City Council, rather than the Mayor, as provided in SMC 3.92.010A.

Explanation. When the position of head of a department or office becomes vacant, SMC 3.92.010A provides that the highest-ranking officer or employee shall become the acting department or office head, unless the Mayor determines otherwise, with Council concurrence:

A. If any appointive Charter office to be filled by mayoral appointment or the position of department or office head in any department or office created by ordinance becomes vacant, to ensure that the department or office functions and the interest of the public is protected pending the filling of such vacancy under Charter Article XIX, Section 6, (Note 1) or applicable ordinance, the highest-ranking unsubordinated officer or employee in such department or office shall perform, in addition to his/her regular duties, the duties of such appointive office unless the Mayor determines, and the President of the City Council and the Chair of the City Council Finance Committee concur, and so indicate their concurrence in writing filed with the City Clerk, that the interests of the City would be better served by the designation of another person of the Mayor's choosing to serve as acting head of such department or office.

For positions that are appointed by the City Council, such as the Hearing Examiner and the City Auditor, it is more appropriate for the City Council President to make the determination of whether the "next in command" should automatically become the acting head of the office. SMC 3.92.010B provides this for the City Auditor position. A similar section should be written to make this the case for the Hearing Examiner.

6. Comparison With Other Jurisdictions

Recommendation. The City Council can look at other jurisdictions for models of ways Seattle could establish performance review and accountability processes for the Hearing Examiner.

Explanation. We reviewed hearing examiner positions and offices in Washington State in Tacoma, King County and Snohomish County, and in Portland, Oregon. All of these offices hear land use cases and a variety of other cases.

Exhibit 2 below shows, for each jurisdiction, how the Hearing Examiner is appointed and removed, whether a performance review is done and by whom, and the number of staff in the office.

Exhibit 2

Jurisdiction	Appointed/ Removed By	Term	Performance Review By	#/Type of Employees
King County	County Council	4 years	Council Chair + 2 Others	1.5 Hearing Examiner 2 Legal Secretary 1 Office Mgr
Portland, Oregon	Elected City Auditor	None	Auditor	1.5 Hearing Examiner 3 Administrative Support
Tacoma	City Manager	None	City Manager	1 Hearing Examiner 1 Legal Secretary
Snohomish County	County Council	1 year, then 2 years	None	2 Hearing Examiner 1 Clerk 1 Administrative Support
Seattle	City Council	1 year, then 4 years	None	2 Hearing Examiner 2 Paralegal 1 Administrative Analyst

SC/MD/tlb

cc: Mayor Nickels
City Councilmembers
Meredith Getches